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December 26, 2006

By Hand

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*
CC Docket 96-128

Petition of the Payphone Association of Ohio To Preempt and for a Declaratory Ruling

Dear Ms. Dortch:

Enclosed please find an original and nine (9) copies of the Petition of the Payphone Association of Ohio to Preempt and for a Declaratory Ruling in the referenced docket.

A Receipt Copy is also enclosed. Please receipt-stamp this copy and return it to the courier delivering the filing and direct any questions or correspondence to the undersigned.

Very truly yours,
Technology Law Group, L.L.C.

Neil S. Ende
Alexandre B. Bouton
Greg Taylor
Counsel to the Payphone Association of Ohio

NSE/hs
Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket 96-128
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	

Petition of the Payphone Association of Ohio
to Preempt the Actions of the State of Ohio Refusing to Implement
the FCC's Payphone Orders, Including the Refund of
Overcharges to Payphone Providers in Ohio, and for a Declaratory Ruling

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December 27, 2006

EXECUTIVE SUMMARY

The Payphone Association of Ohio ("PAO"), petitions the Commission for declaratory ruling establishing the rights of the members of the PAO to the refund of overcharges for amounts collected in excess of lawful payphone rates back through to April 15, 1997. PAO also seeks an order pre-empting the State of Ohio's refusal to implement the orders of the Commission in CC Docket 96-128, requiring the assessment of cost-based rates to payphone providers and the refund of charges in excess of such rates. Finally, PAO requests that the Commission order SBC-Ohio, immediately to disgorge and return all dial-around compensation collected pursuant to Section 276 and the FCC's rules and orders promulgated thereunder.

The facts and legal issues presented to the Commission are simple and straight-forward: (i) SBC never filed a new tariff for payphone rates charged to its competitors with the Commission or the PUCO as required by the Commission's Order on Reconsideration; (ii) SBC falsely certified to the FCC that its rates were compliant with the applicable pricing standards; (iii) through this false certification SBC became eligible to collect dial around compensation; (iv) SBC was party to the letter, written by the RBOC coalition, in which those parties expressly and specifically committed to reimburse customers for charges determined to be in excess of the applicable cost standard, and to do so (even in the face of inconsistent tariffs) back to April 15, 1997; and (v) in addition to the RBOC coalition's express and specific commitment to reimburse, SBC also specifically and expressly represented and promised in written letter to the PUCO that refunds would be paid back to April 15, 1997 if the rates were revised downward after a review of the new cost data submitted with that letter.

The Public Utilities Commission of Ohio ("PUCO") initiated Case No. 96-1310 to implement the requirements of the FCC's Orders in CC Docket No. 96-128. Accordingly, the PUCO specifically ordered that the required tariff filings be made by January 15, 1997 and within the defined docket. SBC

made no such tariff filing, and the PUCO erroneously concluded that it approved SBC's tariff on September 25, 1997. On September 1, 2004, PUCO determined that the SBC-certified rates were in fact, not compliant going back to April 15, 1997 with the applicable cost standard, and therefore, the rates were violative of the Commissions express orders. However, the PUCO ordered SBC to make refunds of excessive unlawful rates since January 30, 2003, instead of April 15, 1997, resulting in a six-year windfall to SBC of untold millions of dollars.

Given the material difference between SBC's rates and the applicable cost standard, there can be little doubt that SBC's certification was knowingly false and that it was merely offered as the means to obtain the substantial sums available in dial around compensation. By the same token, SBC's comprehensive and ongoing refusal to provide any refunds against rates that were determined by the PUCO to be materially above the applicable cost standard, as well as its assertion of the filed rate doctrine, demonstrates beyond any reasonable doubt that SBC's express promises to make such refunds, as well as its commitment not to assert the filed rate doctrine as a defense, were nothing short of knowing misrepresentations.

The Telecom Act establishes a clear national policy favoring cost-based rates and full competition in the provision of payphone services and further provides the absolute statutory authority, for the FCC to preempt state regulatory schemes or other requirements which fail to implement or which conflict with the federal mandate. Indeed, Section 276 could not be more explicit in mandating pre-emption in the case of a conflict between the states and the FCC: "to the extent that any state requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements." 47 U.S.C. § 276. Further, in the payphone arena, the FCC has consistently recognized its right, and indeed its obligation, to preempt inconsistent state requirements. Indeed, in its Payphone Orders,

the Commission specifically states it would pre-empt any state action inconsistent with the requirements of those payphone orders.

As the Commission is well aware, the filed rate doctrine has for decades, been a weapon used by carriers to collect rates in excess of the rates contained in direct agreements between that carrier and its customers. However, it cannot be applied in this matter. The higher rates charged by SBC from April 15, 1997 forward were never established as the lawful rate(s) under Section 276, and thus never obtained the status of lawful rates that could be the basis of a claim under the filed rate doctrine.

The Commission also has repeatedly made clear, in numerous orders, that the RBOCs are not eligible to collect dial-around compensation until their rates meet this cost standard. The RBOCs were granted a waiver of this eligibility requirement on the express and agreed-to condition that they would make full refunds of any amounts collected in payphone charges in excess of the cost-based rate as subsequently determined by the state regulatory authority. Notwithstanding these orders, for more than nine years, SBC has continued to employ payphone rates and to collect payphone charges that were well in excess of prescribed levels.

Section 503 of the Communications Act sets forth the circumstances in which the Commission has the authority to impose monetary forfeiture penalties. Not surprisingly, one such circumstance is where a party has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation or order issued by the Commission . . . ." 47 U.S.C. § 503.

The FCC also has the right to apply remedies other than monetary forfeitures. For example, where, as here, the party's violation includes the breach of an agreement with the FCC, the FCC has the right to, and in this case most certainly must require that party to disgorge all monetary gains obtained through violation of that agreement. A failure to impose this remedy would have the perverse effect of continuing to reward SBC both for its failure to charge cost-based rates, as well as for its willful and blatant breach of its refund agreement.

Section 276(a) prohibits any Bell Operating Company providing payphone service from acts which would "subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and shall not prefer or discriminate in favor of its payphone service. 47 U.S.C.A. 276(a) (emphasis added). The clear intent of this provision was to level the competitive playing field between RBOC-provided payphones and private payphones by requiring, *inter alia*, that the rates charged by the RBOCs be cost-based. In addition to the clear mandate of Section 276, it is also well settled that the FCC is required to consider issues of anti-competitive conduct and effect as a part of its obligation to serve the public interest.

SBC's refusal to make refunds is not only in direct violation of its express agreement and the FCC's express mandate that it do so, it is plainly anticompetitive. Indeed, not only has SBC materially overcharged the private payphone providers with which it competes—causing them the very competitive harm that Congress sought to prevent—it has retained those revenues for nearly a decade while simultaneously collecting millions in dial-around revenues.

By any measure, SBC is required as a matter of law to make immediate refund of all amounts collected from the members of the PAO since April 1997 and to make an award of reparations, consistent with federal law and in favor of PAO. In addition, SBC must be required to make an immediate deposit of all amounts collected in dial-around compensation unless and until such refunds are made.

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket 96-128
Petition of the Payphone Association of Ohio To Pre-empt the Actions of the State of Ohio Refusing to Implement the FCC's Payphone Orders, Including the Refund of Overcharges to Payphone Providers in Ohio, and For a Declaratory Ruling	)	

Petition of the Payphone Association of Ohio to Pre-empt the Actions of the State of Ohio Refusing to Implement the FCC's Payphone Orders, Including the Refund of Overcharges to Payphone Providers in Ohio, and for a Declaratory Ruling

The Payphone Association of Ohio ("PAO"), through counsel and pursuant to Rule 1.227 of the Federal Communications Commission's ("FCC" or "Commission") Rules, 47 C.F.R. § 1.2 *et seq.*, hereby petitions the Commission for declaratory ruling establishing the rights of the members of the PAO to the refund of overcharges for amounts collected in excess of lawful payphone rates back through to April 15, 1997. In addition, the PAO seeks an order pre-empting the actions of the State of Ohio, implemented, *inter alia,* through the Public Utilities Commission of Commission ("PUCO") in Case No. 96-1310-TP-COI, refusing to implement the orders of the Commission in CC Docket 96-128,[1] and its several waiver orders,[2] requiring the

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[1] *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, FCC 96-388, September 20, 1996, 11 FCC Rcd. 20541, ¶¶ 146-147 *("First Payphone Order")*, and Order on Reconsideration, November 8, 1996, 11 FCC Rcd. 21233 ¶¶ 131, 163 *("Payphone Reconsideration Order"), aff'd in part and remanded in part sub. nom., Illinois Public Telecommunications Assn. v. FCC,* 111 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing,* 123 F.3d 693 (D.C. Cir. 1997), *cert. den. sub nom., Virginia State Corp. Comm'n v. FCC,* 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997,

assessment of cost-based rates to payphone providers and the refund of charges in excess of such rates. In addition to refunds, PAO requests that the Commission order SBC-Ohio (f/k/a Ameritech and referred to hereinafter as, "SBC"), immediately to disgorge and return all dial-around compensation collected pursuant to Section 276 and the FCC's rules and orders promulgated thereunder.

INTRODUCTION

1. The facts and legal issues presented to the Commission are remarkably simple and straight-forward. The unalterable and undeniable facts are that: (i) SBC never filed a new tariff for payphone rates charged to its competitors with the Commission or the PUCO as required by the Commission's Order on Reconsideration; (ii) SBC falsely certified to the FCC that its rates were compliant with the applicable pricing standards; (iii) through this false certification SBC became eligible to collect dial around compensation; (iv) SBC was party to the letter, written by the RBOC coalition, in which those parties expressly and specifically committed to reimburse customers for charges determined to be in excess of the applicable cost standard, and to do so (even in the face of inconsistent tariffs) back to April 15, 1997; and (v) in addition to the RBOC coalition's express and specific commitment to reimburse, SBC also specifically and expressly represented and promised in written letter to the PUCO that refunds would be paid back to April 15, 1997 if the rates were revised downward after a review of the new cost data submitted with that letter.

¶¶ 12, 30-33, 35 (CCB released April 4, 1997) *("Bureau Waiver Order");* Order DA 97-805, 12 FCC Rcd. 21370, (CCB released April 15, 1997) *("Bureau Clarification Order," or "Clarification Order").*

[2] See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket 96-128, 12 FCC Rcd 20997, ¶¶ 30-33 (Released April 4, 1997), and *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket 96-128, 12 FCC Rcd. 21370 (April 15, 1997).

2. Given the material difference between SBC's rates and the applicable cost standard, there can be little doubt that SBC's certification was knowingly false and that it was merely offered as the means to obtain the substantial sums available in dial around compensation. By the same token, SBC's comprehensive and ongoing refusal to provide any refunds against rates that were determined by the PUCO to be materially above the applicable cost standard, as well as its assertion of the filed rate doctrine, demonstrates beyond any reasonable doubt that SBC's express promises to make such refunds, as well as its commitment not to assert the filed rate doctrine as a defense, were nothing short of knowing misrepresentations. As troubling as these facts are, even if the Commission were willing to turn a blind eye to this misconduct, refunds are plainly required as they represent the sole consideration that was to be provided by SBC in return for the right it obtained to collect dial around compensation. See Second Waiver order at 25. The only remaining question is whether the FCC will stand idly by and allow SBC to renege on its promise to provide refunds of amounts unlawfully collected while retaining the substantial sums it collected in return for that promise.

BACKGROUND

3. The PAO is a not-for-profit corporation organized under the laws of the State of Ohio and is comprised of independent payphone providers operating therein. The members of the PAO have authorized the filing of this Petition.

4. The members of the PAO purchase local exchange services required to provide payphone services to their customers from SBC, an RBOC operating in the State of Ohio.

5. On September 20, 1996, the FCC released its Report and Order in CC Docket 96-128 requiring, *inter alia*, that RBOCs provide payphone services to independent payphone

providers on the same terms and conditions as they provide those services to their own payphone operations. In the Reconsideration Order issued shortly thereafter, the FCC sought to implement this requirement by ordering each RBOC to file with the appropriate public utility commission, revised tariffs containing nondiscriminatory, cost-based rates, consistent with the requirements of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996) ("Telecommunications Act" or "Act").

6. On December 9, 1996, the PUCO initiated a proceeding designed to implement, on an intrastate basis, the requirements of Section 276 of the Telecommunications Act and the FCC's Orders in CC Docket 96-128. By Entry issued December 19, 1996, the PUCO directed all RBOCs operating in the State of Ohio to file tariffs, by January 15, 1997, containing the access line provisions necessary for private payphone service providers to provide services to their customers. A number of Ohio RBOCs, including SBC, never made the tariff filing required by this Entry.

7. On April 8, 1997, The Payphone Association of Ohio ("PAO") filed a motion to intervene and become a party in the case.

8. By Entry issued on May 22, 1997, the PUCO sought to implement additional requirements of the FCC Orders in CC Docket 96-128 not related to the rates SBC charged to its competitors.

9. On May 16, 1997, as a means of becoming eligible to receive dial around compensation, SBC filed cost support data, complete with a detailed letter that committed to refund payphone providers for any downward revision of its rate(s), once the state commission reviewed these new materials.

10. On June 30, 1997, the PAO filed a motion with the PUCO requesting an evidentiary hearing to determine whether the tariffs filed by the RBOCs were, in fact, compliant with each of the requirements of the Telecommunications Act, the FCC Orders in CC Docket 96-128, as well as the Orders of the PUCO implementing those requirements.

11. In its September 25, 1997 Entry, the PUCO ordered, "that the proposed tariffs and carrier common line rate reductions filed by the incumbent local exchange carriers (which included SBC) are approved." This Entry in finding (7) notes that the Payphone Association of Ohio filed a motion for evidentiary hearing to determine whether LECs were in compliance with Section 276, and the FCC Decisions in CC 96-128, and Ohio 96-1310. Ohio's Commission indicated that questions of compliance remained unclear, and indicated further subsequent entries regarding compliance were forthcoming. *PUCO Entry*, Finding 7 (September 25, 1997).

12. By Entry issued on January 28, 1999, the PUCO granted the PAO's motion for evidentiary hearing. The PUCO also specifically noted in finding (8) of the Entry that "the Commission finds that there is insufficient evidence on the record to support that the payphone tariffs of several RBOCs including SBC comply with the FCC's orders." *Id.* at Finding 8.

13. By Entry issued April 27, 2000 the PUCO noted that SBC argued that refunds were an appropriate consideration, however the PUCO limited the scope of Ohio Case number 96-1310 refusing to consider refunds, citing that refunds would amount to improper retroactive ratemaking.

14. By Entry on reconsideration dated June 22, 2000, the PUCO again refused to consider refunds, relying on Ohio's filed rate doctrine.

15. Without the benefit of hearing or the taking of any evidence, by Entry issued on November 26, 2002, the PUCO established interim rates for payphone services, subject to a true-

up following the completion of the hearing. SBC, which was then the only remaining RBOC in the proceeding,[3] was ordered to file revised tariffs containing the interim rates established in the November 26, 2002 Entry.

16. Commencing on January 29, 2004, the PUCO held hearings to take evidence as to whether SBC's revised tariffs met the requirements of the Telecommunications Act, the FCC Orders in CC Docket 96-128, as well as the Orders of the PUCO implementing those requirements. By Opinion and Order issued on September 1, 2004, the PUCO found SBC's proposed payphone rates were not in compliance with the New Services Test and, thus, were not compliant with the pricing standards required by the Telecommunications Act and CC Docket 96-128. Specifically, the PUCO concluded the physical collocation aspects of the pricing "methodology, as applied by SBC in this case, fails to rise to the reasonableness standard of the NST [i.e., the New Services Test]." *PUCO Opinion and Order*, at 30. The PUCO, however, refused to address the issue of refunds, leaving PAO without the relief intended by Congress and the FCC for the overcharges found by the PUCO to have occurred for the prior seven years.

17. PAO appealed the PUCO's September 1, 2004 Order both with respect to the conclusion that PUCO's rates exceeded the applicable costing standard and in the PUCO's refusal to consider the refund issue. *Payphone Association v. Pub. Util. Commission of Ohio*, 109 Ohio St.3d 453, (2006).

18. The affirmation by the Supreme Court of Ohio of the PUCO's essential findings renders that action, and the associated errors, final. The FCC has retained jurisdiction to implement the requirements of Section 274 and its orders, including with respect to refund requirements, in the event a state was either unwilling to implement them or was barred from

[3] Consistent with the FCC's conclusion in the Wisconsin Case that it does not have jurisdiction over non-BOC RBOCs. all parties other than SBC had been dismissed from the proceeding prior to the issuance of this Entry.

doing so. (Second Waiver Order, footnote 60; Wisconsin Order at par 15). As neither the PUCO nor the Ohio Supreme Court has addressed the refund issue directly, or resolved it in a manner required by federal law, the issue is properly before the FCC for consideration in this docket.

ARGUMENT

19. In Section 276 of the Telecommunications Act, Congress established a clear policy mandate favoring the establishment of a competitive payphone industry and ensuring payphone service providers were properly compensated for the services they provide. In a series of unambiguous orders, the FCC established a regulatory framework under which this policy mandate would be implemented. This framework required, among other things, that the states review to determine, under cost-based standards established by the Commission, with an effective date no later than April 15, 1997, the rates applicable to payphone services provided by the RBOCs. In a series of additional orders, and with the specific agreement of the RBOCs, including SBC, the FCC unambiguously stated that the RBOCs, including SBC, would be required to reimburse or provide credits to the independent payphone providers "for those payphone services from April 15, 1997 if newly tariffed rates, when effective, are lower than existing rates." *Second Waiver Order* at 21379-80, ¶ 20.

20. Neither Congress' policy mandate, nor the FCC's orders, could be clearer. The RBOCs were required to bring their rates to the required cost basis effective no later than April 15, 1997. Order on Reconsideration in CC Docket No. 96-128 at ¶ 163. If they failed to do so, either by intent or as a result of regulatory delays, they would be required to refund or reimburse the independent payphone providers for amounts collected in excess of lawful amounts.

21. SBC did not seek reconsideration of the refund obligations established by the Commission's Order, nor was that obligation ever modified or limited in any respect. As a

result, the obligation to refund overcharges, back to April 15, 1997, represents a standing order of the FCC.

I. The PUCO Has Determined That SBC's Payphone Rates Have Been In Excess Of The Applicable Costing Standard Since April 15, 1997

22. Case No. 96-1310 was initiated by the PUCO to implement the requirements of the FCC's Orders in CC Docket No. 96-128 (In the Matter of Implementation of the Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996). In its December 19, 1996 Entry in Case No. 96-1310, the PUCO found:

> (1) . . .the FCC's Order requires, among other things, local exchange carriers (LECs) to provide payphone services to competitors under the same terms and conditions that they provide services to their own payphone operations.
>
> (2) On November 8,1996, the FCC released its Order on Reconsideration in CC Docket No. 96-128 requiring every incumbent LEC to provide to its respective state commission, by January 15,1997, proposed tariffs offering individual central office coin transmission services to payphone service providers (PSPs) under nondiscriminatory, public tariff offerings.
>
> (3) . . .tariffs for these payphone services must be cost based, consistent with the requirements of Section 276 of the 1996 Act and nondiscriminatory [*i.e.,* consistent with the New Services Test pricing standard set forth by the FCC in CC Docket No. 96-128].

23. The PUCO's December 19, 1996 Entry specifically ordered that the required tariff filings be made: (i) within the defined docket; and (ii) by January 15, 1997. No waivers of the tariff filing requirement were either requested from or granted by the PUCO.

24. A review of the docket card in Case No. 96-1310-TP-COI reveals that SBC never filed tariffs in response to the December 19, 1997 Entry, let alone filed tariffs that met the requirements of the FCC or PUCO orders. Instead, in a transparent, *post hoc* effort to construct compliance, SBC apparently now takes the position that a letter sent to the PUCO by its

Regulatory Director, Vitas Cyvas, on May 16, 1997, which made reference to certain cost data, should be deemed sufficient to meet its compliance obligations.

25. As with most efforts of this nature, SBC stumbles over its own inconsistent facts. First, SBC never advise the PUCO, within Case No. 96-1310, as required by the December 19, 1996 Entry, that it intended to rely on its 1985 tariffs as reflecting its compliance with the New Services Test pricing standard. Moreover, even if this were not the case, the Cyvas letter, and the associated cost support data, were not even submitted in Case No. 96-1310. Instead, these materials were submitted in a wholly separate docket, Case No. 97-545, in support of SBC's effort to allow its affiliated payphone operations to become eligible to receive "dial around compensation Even more significantly, despite its current rhetoric, during the relevant time period, SBC specifically and directly admitted it never filed the required tariffs pursuant to the December 19, 1996 Entry in Case No. 96-1310.[4] See the May 16,1997 filing in Case No. 97-545-TP-UNC and the August 11, 2003 SBC Motion to Strike, at pp. 3-4, attached hereto as Exhibit One

26. In this context, it is quite frankly undisputable that SBC did not make any filing, let alone the required tariff filing, responsive to the PUCO's December 19, 1996 Order by the January 15, 1997 date ***and*** that the PUCO erred when it concluded that it had approved SBC's tariff on September 25, 1997. Thus, it is not surprising that the Ohio Supreme Court found that no such filing was ever made. *See Payphone Association v. Public Utilities Commission*, 109 Ohio St. 3d 453, at ¶ 11 (2006) ("PAO is correct in stating that SBC did not file new tariffs following the PUCO's December 19, 1996 Entry.").

[4] In this regard, it is also clear that SBC's May 16,1997 submission to the PUCO staff, its June 12, 1997 filing, and its June 23,1997 filing were not in response to the December 19,1996 Entry and, in any event, were made well outside the required filing period.

27. As a result, the PUCO could not properly rely on SBC's 1985 tariff or any of SBC's subsequent filings in other dockets either as support for its claim of compliant rates or in support of its formal filing requirements. In any event, the PUCO ultimately concluded the rates contained in SBC's tariffs prior to 1997 were not cost-based, and thus in its Order dated September 15, 2004, the PUCO ordered the implementation of compliant rates.

II. SBC's Refund Obligation Relates Back to April 15, 1997

28. The legal framework established by Congress in the 1996 Act established an effective date, no later than April 15, 1997, for the rates applicable to payphone services provided by the RBOCs to meet the cost-based standards established by the FCC. In a series of additional orders, the FCC unambiguously stated that the RBOCs, including SBC, would be required to reimburse or provide credits to the independent payphone providers "for those payphone services from April 15, 1997 if newly tariffed rates, when effective, are lower than existing rates." *Second Waiver Order* at 21379-80, ¶ 20.

29. As set forth above, the PUCO has determined, and the Ohio Supreme Court has affirmed by final order, that SBC's payphone rates have not been complaint with the applicable cost standard since April 15, 1997. As a result, the single factual prerequisite to a mandatory refund has been established and thus refunds of all charges in excess of cost must be made, as a matter of law.

30. Given the absolute clarity of this standard, it is not surprising that SBC and the other RBOCs have gone to great lengths to insert extraneous issues and legal arguments into the discussion. However, as discussed below, none of these issues limits the absolute and binding legal obligation imposed on SBC to make refunds.

A. The PUCO's Refusal to Order Refunds or Reimbursement of Payphone Charges in Excess of the Authorized Rate Back to April 15, 1997 is Erroneous as a Matter of Fact and Law

31. In its September 1, 2004, Opinion and Order, the PUCO concluded that SBC's proposed payphone rates were not in compliance with the New Services Test pricing standard. Specifically, the PUCO concluded that:

> we must reject all overhead loading factors proposed by SBC. Based on the record, and as an alternative to overhead loadings based upon comparable competitive services, we shall adopt the recommendation of the PAO. That is, we conclude that it is appropriate to apply UNE overhead loadings to the direct costs of the payphone services that are the subject of this proceeding. UNE overhead loadings are known and are deemed by the FCC to be in compliance with Section 276 of the Act. In deciding to employ UNE overhead loadings, we are not invalidating the *Physical Collocation Tariff Order* methodology. We only conclude that the methodology, as applied by SBC in this case, fails to rise to the reasonableness standard of the NST.

PUCO Opinion and Order, at 30 (emphasis added). On this basis, the PUCO ordered SBC to "institute permanent rates for COCOT Line, COCOT Coin Line, Local Usage, Answer Supervision, and Restricted Coin Access, consistent with Appendix A and this Opinion and Order." *Id.* However, as set forth above, rather than require SBC to refund excess amounts collected back to April 15, 1997, as clearly required by federal law, and as SBC had expressly agreed to do, the PUCO limited the period to which the refund would be applied to January 30, 2003 the date on which the PUCO had implemented its interim rates. *Id.*

32. The limitation applied by the PUCO to the period to which the refund obligation would be applied is predicated on findings of fact that cannot be sustained. As an initial matter, as described above, there is no dispute that SBC charged rates and collected sums based on rates which were in excess of lawful levels from April 15, 1997. There is also no dispute, as a matter of fact, that the FCC has concluded, as a matter of federal law, that all RBOCs, including SBC, would be required to refund all amounts collected in excess of lawful rates from April 15, 1997 forward.

33. Moreover, in its orders, the PUCO does not even attempt to reconcile its refund date with the federal mandate that refunds be made back to 1997. Nor does the PUCO even attempt to explain, or to justify, why it took nearly seven years—from May 1997, when SBC filed its alleged cost support to January 10, 2003—to establish the interim rates on which it relies to calculate the refund amount.

34. In this context, even if the PUCO's use of the interim rate date as the date from which refunds are due could be sustained as a matter of principle, the extraordinary delay in establishing that date is clearly inconsistent with the federal policy mandate, established in Section 276, and implemented in the FCC's Payphone Orders, promptly "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(l). The delay in establishing this date, standing alone, fully justifies the preemption of state authority by the FCC and the application of the April 15, 1997, refund date established by the FCC and required as a matter of federal law.

B. SBC's Lawful Obligation To Make Refunds Is Further Established By Its Express Commitment To Make Such Refunds

35. As discussed above, the legal framework implemented by the FCC pursuant to the mandate of Congress expressly requires SBC to make refunds for the overcharges it has assessed on the members of PAO since April 15, 1997. This legal obligation is clear and absolute. However, were this not enough—which it clearly is—SBC has also specifically bound itself by agreement to make such refunds in return for the right to collect dial around compensation.

36. Specifically, in considering the issue of per call compensation to payphone service providers pursuant to Section 276(b)(1)(A) of the Telecommunications Act, the Commission was called upon to decide whether RBOCs should be allowed to collect such compensation before they implemented the cost-based rates compliant with the New Services

Test. In a series of orders issued in 1997, the FCC made it clear that compliance with the New Services Test was an absolute prerequisite to collection of per call compensation. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, 12 FCC Rcd 20997, ¶¶ 30-33 (Released April 4, 1997) ("*First Waiver Order*"). *See also Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128 (Released September 20, 1997) ("*First Payphone Order*"), at ¶ 146; *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128 (Released November 8, 1996) ("*First Payphone Reconsideration Order*"), at ¶¶ 131, 162-63.

37. The RBOCs, however, were not prepared to certify that their rates were compliant with the New Services Test by April 15, 1997, when dial-around compensation ("DAC") became available. Thus, numerous RBOCs, including SBC, filed petitions with the FCC seeking a temporary waiver of the New Services Test to allow them to start collecting dial-around compensation on April 15, 1997, prior to any certification that their rates met the New Services Test. In connection with these petitions to the FCC, SBC joined in a letter from a coalition of RBOCs in which it pledged that:

> Where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

See Letter from Michael K. Kellog to Mary Beth Richards, (April 10, 1997), at page 1. A copy of this letter is attached as Exhibit Two– hereto.

38. SBC made this same unambiguous pledge to the PUCO:

> As reflected in the FCC's April 15, 1997 Order, SBC [now AT&T] has agreed that if state commissions, upon reviewing these new materials concerning the "new services test," require any tariff rates to be revised downward, SBC will make refunds of those rates back through April 15, 1997.

May 16, 1997 letter from Vitas R. Cyvas of SBC to Roger Montgomery of the PUCO Telecommunications Division. A copy of this letter is attached as Exhibit Three– hereto.

39. SBC's letter to the PUCO is critical for several reasons. First, as noted, the letter clearly established SBC's commitment and obligation to make refunds back through April 15, 1997. Second, it is noteworthy that nowhere in any communication from any RBOC, including the letters referenced above, did any RBOC, including SBC, state or even suggest, that its refund obligation would be limited to the waiver period.

40. Third, and most critically, inasmuch as SBC's commitment to the PUCO was set forth in a letter covering its submission of cost data in support of its payphone tariffs, it puts the lie to the creative, after the fact, argument, made by other RBOCs, that since they did not make the required tariff filing during the forty-five day grace period, they never "took advantage" of the waiver, and, thus, the refund obligation never came into existence. Indeed, by associating its refund commitment with the filing of its cost data ***during the forty-five day grace period***, and by expressly tying its refund commitment to the refund obligations of the FCC's April 15, 1997 Order, SBC's May 16, 1997, letter specifically and directly links its right to collect dial-around compensation in Ohio to its refund commitment back to April 15. 1997. Thus, even if the RBOC's disingenuous attempt to limit its refund obligation is accepted in other jurisdictions, it cannot rescue SBC here as its ***commitment***

was made during the forty-five day grace period and it is expressly tied to the refund obligations of the FCC's April 15, 1997 Order.[5]

41. The FCC addressed these waiver requests in its April 15, 1997 payphone Order. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, 12 FCC Rcd. 21370 (April 15, 1997) ("*Second Waiver Order*"). In this Order, the FCC granted each of the wavier requests, thereby allowing the subject RBOCs to collect dial-around compensation in advance of a final determination that their rates were in compliance with the New Services Test. Consistent with the arrangement set forth in the waiver requests, waivers were granted on the express and unambiguous condition—offered by the RBOCs and accepted by the FCC—that each RBOC would reimburse or provide credits to the independent payphone providers "for those payphone services from April 15, 1997 if newly tariffed rates, when effective, are lower than existing rates." *Second Waiver Order* at 21379-80, ¶ 20.

42. Amazingly, but not surprisingly, the RBOCs have reneged on their commitment to provide refunds and, to date, have not even made refunds back to January 10, 2003 as expressly required by the PUCO Order. SBC's conduct is thus not only in direct, knowing and material violation of the Second Waiver Order and the PUCO's limited refund order, but also of its binding legal commitment to the Commission to make full refunds of amounts collected in excess of the applicable cost standard, and to do so back to April 15, 1997.

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[5] This evidence--which the PUCO refused to consider as beyond the scope of the hearing--clearly establishes that SBC knew, understood and specifically agreed in 1997 that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997. While the PUCO improperly refused to consider SBC's direct admission of liability, the FCC is clearly not bound by this evidentiary ruling and should consider this evidence in the fulfillment of its federal obligations. Indeed, to the extent the FCC considers a claim that SBC never "took advantage" of the waiver, and, thus, the refund obligation never came into existence it would be prejudicial in the extreme to fail to consider SBC's specific and repeated admissions to the contrary.

III. The FCC Has the Authority to Preempt, and Must Do So

43. The Telecom Act establishes a clear national policy favoring cost-based rates and full competition in the provision of payphone services. The Act also provides the absolute statutory authority, for the FCC to preempt state regulatory schemes or other requirements which fail to implement or which conflict with the federal mandate. Indeed, Section 276 could not be more explicit in mandating pre-emption in the case of a conflict between the states and the FCC: "to the extent that any state requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall pre-empt such state requirements." 47 U.S.C. § 276. That is, unlike many circumstances where pre-emption is allowed but reluctantly implemented, in this instance, pre-emption is not optional; the FCC is required to pre-empt where, as here, a state's requirements are inconsistent with the federal mandate.

44. In the payphone arena, the FCC has consistently recognized its right, and indeed its obligation, to preempt inconsistent state requirements. Indeed, in its Payphone Orders, the Commission specifically states it would pre-empt any state action inconsistent with the requirements of those payphone orders. *See Report and Order*, at ¶ 147; *Order on Reconsideration.* 11 FCC Rcd. 21233, 21328 (at ¶ 218). Moreover, the Commission has followed through on its commitment to do so. For example, *In the Matter of New England Public Communications Council Petition for Pre-emption Pursuant to Section 253,*[6] the Commission, after finding that the "purpose of section 276 is 'to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public,'" went on to conclude that:

> the *DPUC Decision*, on its face, is inconsistent with the terms, tenor and purpose of section 276 and our implementing rules, and therefore is preempted. Section 276(b)(1) addresses "competition *among* payphone service providers" and seeks to promote "the widespread deployment of payphone services to the general

[6] CC Docket 96-11, *Memorandum, Opinion and Order*, FCC 96-470, 1996 WL 709132(December 10, 1996),

> public."[7] That subsection also acknowledges that RBOC payphone service providers "have the same right that *independent payphone providers* have" regarding interLATA presubscription.[8] Connecticut bars entities other than incumbent or certified LECs from providing payphone services. This state regulatory prohibition conflicts with a federal statutory regime that contemplates and promotes competition and the provision of payphone services by independent providers. Accordingly, we find that section 276 preempts the *DPUC Decision*.

Memorandum Opinion and Order, at ¶ 27.

45. Preemption is also clearly appropriate in this instance, as it was in *New England Public Communications Council*, as both the federal mandate and policy, as set forth in Section 276 of the Act, and implemented through the FCC's Payphone Orders, is clear and specific both with respect to the obligation to establish cost-based rates and to make refunds for all amount charged in excess of those rates after April 15, 1997. In Ohio, unlike some other jurisdictions where the RBOC is denying that it "took advantage" of the waiver, it is absolutely clear that SBC knew, understood and specifically agreed in 1997, when it made its filings, that any refund obligation based on the assessment of charges in excess of lawful levels would relate back to April 15, 1997.

46. Moreover, in Ohio, unlike some other jurisdictions, it is also absolutely clear and undeniable that the PUCO found SBC's payphone rate to be in excess of that allowed under the "New Services Test" and that it specifically and expressly ordered SBC to file tariffs containing the required lower rates. Further, there is also no doubt the limited refund requirement established by the PUCO is facially and materially inconsistent with the FCC's mandate that refunds relate all the way back to April 15, 1997, and not just until the January 30, 2003 interim rate date, a date arbitrarily set by the PUCO. Finally, there is no doubt of the inconsistency between the FCC's refund mandate and the PUCO's refund order is material—inasmuch as the applicable refund period is nearly six years earlier

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[7] 47 U.S.C. § 276(b)(1) (emphasis added).

[8] 47 U.S.C. § 276(b)(1)(D) (emphasis added).

under the PUCO order—and would result in the failure by SBC to refund tens of millions of dollars in overcharges collected during that seven-year period.

47. Each of the prerequisites to preemption is clearly met in the instant matter. The issues at hand have been fully considered by the PUCO and a final Order has been rendered by the Ohio Supreme Court. The resulting legal determinations are plainly and materially inconsistent with clearly enunciated federal law and policy. Accordingly, the Commission not only has the right, it has the obligation to preempt and to order full refunds back to 1997 as required by federal law.

IV. The Payment of Refunds Does Not Constitute Retroactive Ratemaking Nor Does It Violate the Filed Rate Doctrine

48. The principles of retroactive ratemaking and the filed rate doctrine are each based on the application of tariff filing and application requirements set forth in Section 203, 47 U.S.C. § 203, of the Communications Act. Section 203 requires all common carriers to file schedules (tariffs) showing "all charges" for the "interstate and foreign wire or radio communication services" that it provides as well as the classifications, practices, and regulations affecting such charges. In addition, Section 203 declares it unlawful for any carrier to "demand, collect, or receive a greater or less or different compensation" for such communication services.

49. As the Commission is well aware, the filed rate doctrine has for decades, been a weapon used by carriers to collect rates in excess of the rates contained in direct agreements between that carrier and its customers. Indeed, this very issue was among the issues often cited by the Commission as a justification for eliminating the interstate tariff filing requirement. However, troubling as this issue was, and as aggressively as the doctrine was enforced by the courts, the doctrine has never been applied in circumstances where the tariff rate was found to be unlawful *ab initio*. To the contrary, the cases in which the filed rate doctrine has been applied always involved a fact pattern where the customer had signed an agreement containing rates that